STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2005
v	No. 256117 Iosco Circuit Court
RICHARD ALAN GREEN, Defendant-Appellant.	LC No. 01-004288-FH

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court order denying his motion for a new trial based on newly discovered evidence. We affirm.

Defendant and his then live-in girlfriend, Barbara Jo Gilbertson, were convicted of arson of a dwelling house, MCL 750.72, and burning insured property, MCL 750.75, stemming from a September 9, 1999, fire that burned defendant's home. After defendant's conviction, Gilbertson confessed in a letter to her attorney that she acted alone when she started the fire with a candle by setting it to paper on the wall and a wastebasket on the floor. Defendant successfully appealed to this Court on the basis of this newly discovered evidence. Unpublished per curiam opinion of the Court of Appeals, issued January 27, 2004 (Docket Nos. 242832/248240). We remanded for an evidentiary hearing.

On remand, the lower court determined that Gilbertson's new testimony did not warrant a new trial because it did not correspond with the strong trial evidence that the arsonist used an accelerant to start the fire. We review the court's decision to deny defendant's motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). We review the court's factual findings for clear error. *Id.*

A defendant must show the following four elements before a motion for new trial will be granted based on newly discovered evidence: "(1) The evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) including the new evidence upon retrial would probably cause a different result; and (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial." *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996); see MCR 6.508(D). The trial court determined at the conclusion of the evidentiary hearing that three of these four elements were met in this case:

> Although it appears that the defendant does show items (1), (2) and (4), the defendant does not show item (3), that including the evidence upon retrial would probably cause a different result. Because of the inconsistencies in testimony between the co-defendant Ms. Gilbertson and that of the two experts, the new evidence would probably not cause a different result. Further, I did not find Ms. Gilbertson to be a credible witness.

As an initial matter, we note that most jurisdictions and federal circuits that have reviewed similar issues have rejected out of hand the use of a codefendant's emergent post-conviction testimony as a basis for granting a defendant a new trial. See *State v Jackson*, 264 Neb 420, 434; 648 NW2d 282 (2002), and citations therein. Nevertheless, the trial court in this case had particular and independent grounds for finding that the codefendant lacked credibility.

Gilbertson testified that she used a candle to light some paper on fire in the house's southeast bedroom – the bedroom the couple used as an office. Gilbertson testified that she then ran down the hall and left the scene with defendant before he had any notion of her misdeed. While the expert testimony at trial also indicated that the fire primarily burned in the southeast bedroom, the experts testified to their discovery of a trail-like pattern of burning along the hall floor leading into both the southeast and southwest bedrooms. The experts testified that the burn pattern on the carpet and floor was consistent with someone pouring some kind of accelerant on the floor. They also testified that the floor joists below the floor were burned in dripping formations, suggesting that the accelerant seeped into the floor and ran down the joists before ignition. They testified that the fire's pattern, speed, and heat strongly suggested that the accelerant pooled in portions of the southeast bedroom. While no accelerants were detected in samples and none were smelled by witnesses at the scene, the experts presented photographs at trial that substantiated these findings and demonstrated the inordinately straight line of the fire's course and intensity running from the front door along the hall floor and into each of the bedrooms. Because heat spreads upward and outward, these findings below the floor and in the isolated location along the hall floor were objectively inconsistent with Gilbertson's account.

One of the experts also introduced melted strips apparently composed of aluminum that held down carpet and capped the front door's threshold. The expert testified that aluminum melts at about 1220 degrees, and a fire that starts above the floor ordinarily generates about 600 degrees of heat at the floor level. The strips melted only in those areas consistent with the unusually straight path of the fire and showed signs of where they likely made direct contact with burning accelerant. The testimony of both experts was credible and substantiated, and Gilbertson's recent account of events did not correspond with it at all. Moreover, we are persuaded that the jury would not have reached its verdict if it had not accepted the evidence presented by the expert witnesses, so that evidence merits classification as "established fact." "A false confession (i.e., one that does not coincide with established facts) will not warrant a new trial, and it is within the trial court's discretion to determine the credibility of the confessor." *Cress*, *supra* at 692.[1] Therefore, the trial court did not abuse its discretion when it found that

[1] As in *Cress*, *supra*, given the conflict between Gilbertson's confession and the facts established at trial, the trial court concluded that Gilbertson was not a credible witness.

Gilbertson was a false confessor whose account of the fire varied dramatically from the established facts. *Id.*[2]

Defendant next argues that the trial court erred when it failed to consider additional evidence from an expert who would opine that the floor's burn patterns were consistent with Gilbertson's account. We disagree. The trial court correctly determined that the expert's evidence was not "newly discovered" and would have equally supported defendant's original

[2] The dissent admits that the testimony at trial regarding the cause and origin of the fire does not comport with Gilbertson's post-conviction repentance. Presumably, the dissent also concedes that both defendant and Gilbertson had the opportunity to contest the cause and origin of the fire at their joint trial, and that the jury heard, and disregarded, evidence that the fire developed from Gilbertson's accidental failure to snuff out a candle. The dissent also admits that the trial court evaluated the issue within the proper legal framework. Nevertheless, the dissent would vacate the jury's initial findings and portray this case as teetering on the finely honed fulcrum of credibility (between an arsonist and two arson experts) that only a (second) jury can resolve. We prefer to hold that the jury already adopted the expert's substantiated proposition that large quantities of accelerant were poured from one end of the house to the other, leading right out the door. Of course, this straightforward interpretation of the evidence and jury verdict negates defendant's claim of ignorance, but we are not the first to reach that conclusion; a jury precedes us.

Eschewing our straightforward approach and the sensible guidelines established in *Cress*, *supra*, the dissent proposes a new principle of law: expert witness testimony used at trial to establish such basic facts as the cause and origin of a fire is a lesser form of evidence subject to impeachment by a convicted and condemned codefendant's post-trial mea culpa. Of course, the newly enlightened repentance must compassionately, if unrealistically, divert the blame away from the defendant who has the strongest alibi or the longest sentence, not necessarily in that order. While it appears to us that the codefendant is simply lying to liberate her boyfriend because her imposed prison sentence now allows her to assume any measure of guilt for the arson with impunity, we recognize that this conclusion might be the product of misguided assumptions that merely evince the dissent's proposition that a new jury can better determine witness credibility than a seasoned judge. Nevertheless, we prefer a rule of law that upholds jury convictions in the face of such seemingly spurious assaults and allows a court to determine a challenge's validity in a hearing rather than automatically resorting to a retrial by default.

We note that the dissent seems to overlook the rather interesting fact that the "established facts" in *Cress* were the fruit of expert testimony based on indisputable facts. The method of killing in *Cress* was not established by arguments from attorneys or eyewitness accounts, but medical experts who observed the victim's body. Moreover, the dissent apparently fails to realize the distinction between barring a witness's testimony from trial for lack of credibility and denying a motion for new trial based on the determination that the witness is a false confessor. A new witness with an implausible and otherwise incredible account of a crime should not win a defendant a new trial, and to hold otherwise would open the floodgates for every convict with a codefendant who has enough sense to create a "credibility question" in the wake of a fair, but ill-fated, first trial. For the sake of preserving our criminal justice system from the countless new trials such an approach would yield, we prefer to leave the question of a new witness's credibility to the trial court.

defense theory that the fire was accidental. Therefore, the trial court did not err when it prevented defendant from introducing the additional testimony.

Affirmed.

/s/ Peter D. O'Connell
/s/ Pat M. Donofrio